

**Letter of Findings: 04-20150665
Gross Retail Sales Tax
For the Years 2012 through 2014**

NOTICE: IC § 6-8.1-3-3.5 and IC § 4-22-7-7 require the publication of this document in the Indiana Register. This document provides the general public with information about the Department's official position concerning a specific set of facts and issues. This document is effective on its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register. The "Holding" section of this document is provided for the convenience of the reader and is not part of the analysis contained in this Letter of Findings.

HOLDING

Combination Gas Station/Convenience Store failed to meet its burden of establishing that the Department's proposed assessment of additional sales tax was wrong; in the total absence of source sales documentation, its alternative calculation of underreported sales was insufficient to establish that the audit assessment was incorrect.

ISSUE

I. Gross Retail Sales - Assessment.

Authority: IC § 6-2.5-1-2; IC § 6-2.5-2-1; IC § 6-2.5-3-2; IC § 6-2-5-4-1; IC § 6-2.5-5 et seq.; IC § 6-8.1-5-1(c); IC § 6-8.1-5-4(a); Dept. of State Revenue v. Caterpillar, Inc., 15 N.E.3d 579 (Ind. 2014); Indiana Dep't of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463 (Ind. 2012); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007).

Taxpayer argues that the Department's sales and use tax audit overstated the amount of its unreported fuel and convenience store sales and that the assessment of additional tax is unjustified.

STATEMENT OF FACTS

Taxpayer operates a combination gas station and convenience store. The store is located in Indiana. Taxpayer's convenience store sells groceries, beverages, newspapers, gasoline, diesel fuel, lottery tickets, various tobacco products, prepared food, and the like.

The Indiana Department of Revenue ("Department") conducted an audit review of Taxpayer's business records and tax returns for its convenience store sales. During the course of that audit, Taxpayer was asked to provide sales summaries, cash register tapes, trial balances, ledgers and "any other types of sales journals" Taxpayer was unable to provide the requested records.

In reviewing Taxpayer's fuel sales, Taxpayer was asked to provide cash register tapes, daily sales, and fuel inventory records. Taxpayer was unable to provide the requested records.

The audit resulted in an assessment of additional sales and use tax. Taxpayer disagreed arguing that the audit was incorrect. An administrative hearing was conducted during which Taxpayer's representative explained the basis for the protest. This Letter of Finding results.

I. Gross Retail Sales - Assessment.

DISCUSSION

Taxpayer argues that the audit overstated the amount of convenience store and fuel sales. Taxpayer states that it now "has complete and accurate records for the entire period and is able to make the same available to the auditor." Taxpayer claims that the Department "should use those records rather than the [cost of goods sold] method to determine the Taxpayer's liability for sales and use tax."

As a threshold issue, it is the Taxpayer's responsibility to establish that the tax assessment is incorrect. As stated in IC § 6-8.1-5-1(c), "The notice of proposed assessment is prima facie evidence that the department's claim for

the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." Indiana Dep't of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463, 466 (Ind. 2012); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007). Consequently, a taxpayer is required to provide documentation explaining and supporting his or her challenge that the Department's position is wrong. Further, "[W]hen [courts] examine a statute that an agency is 'charged with enforcing . . . [courts] defer to the agency's reasonable interpretation of [the] statute even over an equally reasonable interpretation by another party.'" Dept. of State Revenue v. Caterpillar, Inc., 15 N.E.3d 579, 583 (Ind. 2014). Thus, interpretations of Indiana tax law contained within this decision, as well as the preceding audit, are entitled to deference.

Pursuant to IC § 6-2.5-2-1, a sales tax, known as state gross retail tax, is imposed on retail transactions made in Indiana unless a valid exemption is applicable. IC §§ 6-2.5-5 et seq. Retail transactions involve the transfer of tangible personal property. IC § 6-2.5-1-2; IC § 6-2.5-4-1. A complementary excise tax, known as the use tax, is imposed on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction. IC § 6-2.5-3-2.

It should be pointed out that, "Every person subject to a listed tax must keep books and records so that the department can determine the amount, if any, of the person's liability for tax by reviewing those books and records." IC § 6-8.1-5-4(a). In addition, IC § 6-8.1-5-4(c) provides that, "A person must allow inspection of the books and records and returns by the department or its authorized agents at all reasonable times." IC § 6-8.1-5-4(c).

In the absence of the requested convenience store sales records, the Department relied on the "cost of goods sold" amount reported on Taxpayer's federal income tax returns. The audit relied on "BizStats" to determine the amount of exempt convenience store sales and taxable sales.

The Department's audit reported that Taxpayer had "no records of gasoline and diesel" sales but noted that all of Taxpayer's diesel fuel pumps metered only taxable sales. According to the report, "[T]axpayer had no 'exempt' diesel sales during the audit period."

In the absence of Taxpayer's own fuel sales records, the audit reviewed "actual gallons purchased from [wholesaler]." The audit report states:

[A]ll gallons purchased per month were totaled and multiplied by the average selling price of gasoline or diesel fuel for that month. Data for average selling prices of gasoline and diesel was taken from the US Energy Information Administrations website: www.eia.gov.

In considering Taxpayer's additional information and the audit which led to the currently contested assessment, it is useful to note that this is now the Taxpayer's second audit experience with the Department. In that prior review, the audit report "advised the taxpayer that they were required to keep books and records under IC § 6-8.1-5-4." In this most current audit, the report noted that "[T]axpayer had less records than in the last audit."

In support of its argument that the amount of tax was overstated, Taxpayer has provided a three-page spreadsheet. The spreadsheet lists total sales, exempt sales, and taxable sales for the three years under audit. In apparent recognition that there is no underlying documentation, the spreadsheet "annualizes" sales projections including fuel sales and convenience store sales. The spreadsheet calculation varies substantially from the audit calculation. However, Taxpayer's representative operates under the same handicap as that faced by the Department's audit; there is a complete absence of source documentation necessary to verify that Taxpayer's report is right and the Department's audit was wrong.

The Department does not agree that Taxpayer has met its burden under IC § 6-8.1-5-1(c) of establishing that the proposed assessment is wrong. Taxpayer has presented an alternative calculation representing what Taxpayer itself recognizes was a substantial under-reporting of convenience store and fuel sales but its alternative calculation does not establish that the audit assessment was wrong. At the outset of its protest, Taxpayer's representative stated that it now "has complete and accurate records for the entire period and is able to make the same available to the auditor." Taxpayer failed to do what it said it would do.

FINDING

Taxpayer's protest is respectfully denied.

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